BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

KOONTZ COALITION,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

CASE No. 14-3-0005

(Koontz)

ORDER ON MOTIONS

This matter came before the Board on the motion of the City of Seattle to dismiss the petition for review on various grounds. The Koontz Coalition's (Koontz) petition challenged the City's adoption of Ordinance 124388 (the Ordinance) increasing the amount of the fees that developers may pay in lieu of providing affordable housing in order to obtain more height and floor area than would otherwise be available for projects in downtown Seattle.

The City contends Legal Issues 1 through 4 should be dismissed for the following reasons:

- Legal Issue 1: Koontz lacks standing to bring a claim that the Ordinance violates RCW 36.70A.540 because the Board cannot provide a remedy.
- Legal Issue 2: Koontz's claim that the Ordinance violates RCW 36.70A.106 – Notice to Commerce – is contrary to the facts.
- Legal Issue 3: Koontz's claim that the Ordinance violates RCW 36.70A.040 is brought under the wrong statute.
- Legal Issue 4: Koontz lacks standing to bring a SEPA claim.

In considering the motion, the Board had before it:

- City's Dispositive Motion to Dismiss Petition (City's Motion), April 21, 2014.

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- Petitioner Koontz Coalition's Response to City's Motion to Dismiss (Koontz Response), May 1, 2014.
- City's Reply re Dispositive Motion (City Reply), May 8, 2014.

For the reasons set forth below, as to Legal Issues 1 and 3, the Board decides the threshold questions in Petitioner's favor, reserving the merits of the case to subsequent briefing and argument. Legal Issue 2 is withdrawn and Legal Issue 4 is dismissed.

DISCUSSION AND ANALYSIS

Legal Issue 1 – Violation of RCW 36.70A.540[1]

Because RCW 36.70A.540 authorizes, but does not require, cities to adopt "affordable housing incentive programs," Seattle contends the Koontz Coalition cannot claim APA standing. Seattle points to the third prong of the test for APA standing under RCW 34.05.530:

> (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

Seattle argues that the Board could not order the City to bring the Ordinance into compliance with Section 540 because the affordable housing incentive programs authorized under that section are not mandatory.

In response, Koontz does not dispute that the incentive program is discretionary but asserts: "While the City has legislative discretion to elect to adopt an affordable housing incentive program, once it exercises that authority, any program must comply with the GMA."[2]

Seattle argues, however, that the Board could provide no remedy should it conclude the City's amended fee structure does not comply with Section 540. According to the City,

[1] The Prehearing Order sets forth Legal Issue 1: Does the Ordinance violate RCW 36.70A.540 by increasing fees without increasing incentives?
[2] Koontz Response, at 1.

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the Board's inability to grant a remedy that could eliminate the Petitioner's injury deprives the Petitioner of standing under RCW 34.05.530(3).[3]

The Board has previously recognized that affordable housing incentive programs under RCW 36.70A.540 are optional. In *Futurewise v. City of Bothell,*[4] the Board concluded "the GMA does not require that Bothell include mandatory incentive programs for affordable housing within its housing element." However, the Board commented:

> The Board notes that RCW 36.70A.540 establishes minimum standards for the programs it describes. Therefore, should Bothell decide to opt in to any of the particular incentive programs defined in the statute, *the requirements for such incentive programs are mandatory*.[5]

In the present case, the City of Seattle has adopted an affordable housing incentive program pursuant to RCW 36.70A.540, and thus "the requirements for such incentive program are mandatory."

The Board has ample experience in reviewing optional programs adopted by local governments under various provisions of GMA to determine whether the standards in the applicable legislation have been met. For example, "innovative techniques" such as clustering, design guidelines, density transfer, and conservation easements are allowed, but not mandated, under RCW 36.70A.177 for agricultural lands and under RCW 36.70A.070(5)(b) for rural lands. When such zoning techniques are adopted, they must comply with the relevant provisions of the GMA.[6] Upon review, if the Board finds an optional

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[3] City Reply, at 3, n. 2, citing *McGowan v. Pierce County*, CPSGMHB No. 96-3-0027, Order on Motions, pp. 10-11 (Sep. 5, 1996).

[4] CPSGMHB Case No. 07-3-0014, Final Decision and Order (Aug. 2, 2007), p. 10, affirmed in unpublished opinion, *Futurewise v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 150 Wn. App. 1041 (2009).

[5] *Id*., p. 9, n. 8 (emphasis added).

[6] *See, e.g., Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.* 157 Wn.2d 448, 507-508, 139 P.3d 1096 (2006): "In sum, Lewis County has not been stripped of the ability to use innovative zoning techniques pursuant to RCW 36.70A.177, as it contends. Rather, in invalidating the Lewis County ordinance … the Board was simply making sure that the county's zoning methods are actually 'designed to conserve agricultural lands and encourage the agricultural economy' as required by RCW 36.70A.177 (1)," *Suquamish Tribe v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*,156 Wn. App. 743, 768, 770, 235 P.3d 812 (2010) (reversing and remanding where Board's determination that rural clustering and design guidelines would protect rural character was not supported by substantial evidence in the record.)

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program or zoning technique does not meet the standards in the authorizing language of the statute, the Board will find non-compliance and may make a determination of invalidity.[7]

Seattle's argument concerning Koontz's APA standing appears to be based on the notion that the only remedy that would redress Koontz's injury in the present case would be an order of the Board requiring a specific solution. Seattle provides no authority for this notion.

It is well-settled that the Growth Board's determination of non-compliance does not dictate a particular course of corrective action. *Screen II v. Kitsap County,* CPSGMHB Case No. 99-3-0012, Final Decision and Order (Nov. 22, 1999), at 6 ("Nothing in the [FDO] restricts the county's ability to achieve compliance with the GMA through means other than those discussed in the Board's Order."). As the Board explained in *North Clover Creek II v. Pierce County*, CPSGMHB Case No. 10-3-0015, Final Decision and Order (May 17, 2011), p. 16:

> Nothing in the [FDO or GMA] requires a County to limit its compliance response to the most narrow revisions that could resolve the matter. Indeed, the Board has long held that a city or county has various options in most cases for complying with a Board finding of non-compliance. "A city may, within its discretion, choose to do more than the minimum necessary to comply with an order of the Board." [*Davidson Serles v. City of Kirkland*, CPSGMHB Case No. 09-3-0007c, Order Finding Continuing Non-Compliance and Extending Compliance Schedule (March 12, 2010), at 3, n. 6.] The Board seldom restricts the jurisdiction to the narrowest compliance option.[8]

Thus, in *Peranzi v. City of Olympia*, Case No. 11-2-0011, Compliance Order (Nov. 16, 2012), where petitioners hoped to prevent a permanent homeless encampment by alleging

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[7] *See, e.g.*, *Friends of Pierce County v. Pierce County*, Case No. 12-3-0002c, Final Decision and Order (July 9, 2012), at 50-57 (analyzing innovative program for purchase of conservation easements and TDRs in light of WAC 365-190-050(5) required outcome of protecting economic viability of agricultural industry); *Futurewise v. Whatcom County,* Case Nos. 05-2-0013 and 11-2-0010c, Order Granting Reconsideration (Jan. 23, 2014), at 4-6 (analyzing rural cluster regulations against the standards of RCW 36.70A.070(5)(b), 36.70A.030(15) and (19)); *Bremerton II v. Kitsap County*, CPSGMHB Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 23-26 (analyzing rural cluster program in light of RCW 36.70A.070(5)(b) requirement that such uses "are not characterized by urban growth and are consistent with rural character").

[8] Citing also *LMI/Chevron v. Town of Woodway,* CPSGMHB Case No. 98-3-0012, Order on Compliance (Dec. 20, 1999) at 6 ("It was the Town's choice, and within its discretion, to rescind all, or part, of these ordinances in its effort to remove inconsistencies and achieve compliance with the GMA").

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the authorizing regulation was inconsistent with the comprehensive plan, the City achieved compliance by amending the plan rather than rescinding the regulation.

In the present case, should the Board determine the Ordinance does not comply with RCW 36.70A.540, the City's compliance options are not limited to the Ordinance itself. The City would have a range of choices to achieve compliance, from revising the fee and/or benefit structure to rescinding the program in its entirety. The Board's order is not concerned with satisfying the preferences of the Petitioner but with ensuring compliance with the GMA.

The Board finds and concludes the City's assertion that Koontz lacks APA standing because the Board cannot provide a remedy is without merit. The motion to dismiss Legal Issue 1 is **denied**.

Legal Issue 2 – Violation of RCW 36.70A.106[9]

In Legal Issue 2 Koontz asserted the City failed to submit the Ordinance to the Department of Commerce for review and comment as required by RCW 36.70A.106. At the prehearing conference, the City indicated it would provide Koontz with documentation of its submittal to Commerce.[10] Exhibits G and H to the City's motion demonstrate that the Ordinance was submitted to Commerce October 7, 2013. Koontz's Response withdraws Legal Issue 2.

Legal Issue 2 is **dismissed.**

Legal Issue 3 – Inconsistency under RCW 36.70A.040[11]

In Legal Issue 3, Koontz contends the Ordinance violates RCW 36.70A.040 because the amended development regulations are inconsistent with specific policies of the

[9] The Prehearing Order sets forth Legal Issue 2: Does the Ordinance violate RCW 36.70A.106 because it was not sent to the Department of Commerce for review and comment before it was adopted?
[10] Prehearing Order (April 3, 2014), p. 1.
[11] The Prehearing Order sets forth Legal Issue 3: Does the Ordinance violate RCW 36.70A.040 because it is inconsistent with the Comprehensive Plan, including policies UVG-4, UVG-7, UVG-20, UVG-29, UVG-30, UVG-31, UVG-32, UV-34, H8, DT-G2, and DT-HP3?

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comprehensive plan. The City moves to dismiss asserting RCW 36.70A.040 does not provide a basis for review.[12]

First, the City points out RCW 36.70A.040 applies to initial adoption of plans and development regulations under the GMA. RCW 36.70A.040(3)(d) requires cities and counties to adopt "development regulations that are consistent with and implement the comprehensive plan" by a fixed date. This process was long since completed by Seattle. Second, the City states the relevant GMA provision in this case is RCW 36.70A.130(1)(d) which provides: "Any amendment or revision to development regulations shall be consistent with and implement the comprehensive plan." Koontz responds that the Boards have traditionally recognized consistency challenges for regulatory amendments under both RCW 36.70A.040 and 36.70A.130(1)(d).

Neither party has cited and the Board has not found appellate court authority on the question whether consistency of an amended development regulation is exclusively the province of RCW 36.70A.130. Koontz calls attention to *Kittitas County v. Kittitas County Conservation Coalition*, 176 Wn. App. 38, 57, 308 P.3d 745 (2013), where the Supreme Court held "newly adopted or amended development regulation" must be consistent with and implement the comprehensive plan, citing RCW 36.70A.040(3)(d), (4)(d), (5)(d) and RCW 36.70A.130(1)(d), without distinguishing which provisions were applicable in that case.

Similarly, Growth Board decisions are mixed. The City cites two cases where the Board applied RCW 36.70A.130 in review of consistency of an amended development regulation. *Aagaard v. City of Bothell*, CPSGMHB Case No. 08-3-0002, Final Decision and Order (Oct. 24, 2008), at 24, n. 30 ("Petitioners correctly cited RCW 36.70A.130 as the basis for challenging consistency"), and *Cascade Bicycle Club v. Lake Forest Park*, CPSGMHB No. 07-3-0010c, Final Decision and Order (July 23, 2007), applying RCW

[12] In the Prehearing Order (April 3, 2014) p. 1, the Board stated: "Regarding Legal Issue 3, the Presiding Officer invited the parties to brief the question of whether the inconsistency challenge for amendments to development regulations can be brought under RCW 36.70A.040. Board case law and other authorities conflict on this question, and we have not had the benefit of competent briefing and argument from experienced advocates. This case provides an opportunity for the question to be addressed either through dispositive motion or on the merits."

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36.70A.130. The Board notes neither decision dismissed a consistency issue because of reliance on RCW 36.70A.040.

Koontz cites cases acknowledging both statutory sections as applicable. *Aagaard v. City of Bothell*, CPSGMHB Case No. 08-3-0002, Final Decision and Order (Oct. 24, 2008), at 24 ("Consistency between a plan and a development regulation is required by RCW 36.70A.130(1) and .040. . . ."); *Friends of the San Juans v. San Juan County,* WWGMHB Case No. 10-2-0012, Final Decision and Order (Oct. 10, 2010), at 13 (citing both statutes as applicable to consistency challenge and explaining: "RCW 36.70A.040(3) states that a county must adopt development regulations 'that are consistent with . . . the comprehensive plan." RCW 36.70A.130(1)(d) similarly requires that 'any amendment . . . to development regulations shall be consistent with . . . the comprehensive plan.'"); *Concerned Friends of Ferry County v. Ferry County*, EWGMHB Case No. 97-1-0018, Order on Compliance (Feb. 23, 2010, at 10 (evaluating consistency between amended development regulations and unamended comprehensive plan under both .040 and .130(1)(d)).

The cases establish that the Board has in the past reviewed challenges to consistency of development regulations under either provision of the statute, without determining that challenge to amendment of a development regulation must be dismissed if brought solely under RCW 36.70A.040.[13]

Recently in *Peranzi v. City of Olympia*, Case No. 11-2-0011, Final Decision and Order (May 4, 2012), at 6-7, and *Friends of the San Juans v. San Juan County*, Final Decision and Order (Sep. 6, 2013), at 9, consistency challenges based on Subsection 040 were dismissed, the Board stating the subsection "specifically sets forth initial county and city requirements following passage of the GMA over twenty years ago, including . . .

[13] The Central Puget Sound panel has recently dismissed consistency challenges founded on RCW 36.70A. 040, but for reasons other than failure to cite to RCW 36.70A.130. *Shoreline v. Snohomish County*, Coordinated Case Nos. 09-3-0013c and 10-3-0011c, Order on Motions for Reconsideration (May 17, 2011), at 2-3 (dismissing consistency claim based on RCW 36.70A.040(4) when the applicable subsection was 040(3); *Snohomish County Farm Bureau v. Snohomish County*, Case No. 12-3-0010, Final Decision and Order (May 2, 2013), at 14 (dismissing challenge to comprehensive plan internal consistency based on Subsection 040 and deciding based on reference to Subsection 070 (preamble).

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implementing development regulations."[14] However, both *Peranzi* and *Friends of the San Juans* also alleged violations of RCW 36.70A.130(1)(d), and the inconsistencies were adjudicated on that basis.

In the absence of clear authority in the cases, the Board looks again at the two statutes and notes the requirements of Section 130 are specifically incorporated into Section 040 by RCW 36.70A.130(7)(a):

> The requirements imposed on counties and cities under this section shall be considered "requirements of this chapter" under the terms of RCW 36.70A.040(1).

Thus the periodic review and amendment of plans and regulations and assurance of mutual consistency provided in RCW 36.70A.130 are "requirements of this chapter" incorporated in RCW 36.70A.040. On this reading, consistency of *amended* development regulations may be addressed under Subsection 040.

The Board notes many core provisions of growth management are set forth in sections of the statute which by their express terms apply to initial adoption of plans or regulations. But the Growth Board and appellate courts have had no hesitancy in applying the criteria in these sections of the statute to disputes about subsequent amendments. Initial adoption provisions include, for example:

- RCW 36.70A.170 – initial designation of natural resource lands and critical areas,
- RCW 36.70A.060 – initial adoption of development regulations for natural resource lands and critical areas,
- RCW 36.70A.110 – initial procedure and criteria for urban growth area designation,
- RCW 36.70A.210 – initial procedure and content for county-wide planning policies.

These "initial adoption" sections contain standards which have been held to apply to subsequent amendments. The Board has found no decisions dismissing challenges to

[14] *Peranzi,* at 6-7; *Friends of the San Juans*, at 9. The incorporation of GMA review and amendment requirements into RCW 36.70A.040 by RCW 36.70A.130(7)(a) was not referenced in the decisions.

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amendments to critical areas ordinances or natural resource lands designations/de-designations on the grounds that RCW 36.70A.060 and .170 by their express terms apply only to initial adoptions in September 1991, for example. The City's argument in this case that a consistency challenge based on RCW 36.70A.040 must be dismissed because the section deals only with initial adoptions is difficult to square with GMA jurisprudence concerning other "initial adoption" sections of the statute.

In the absence of clear authority to the contrary, the Board finds the City, which has the burden of proof as the moving party, has not met its burden of demonstrating a challenge to the consistency of amended development regulations with a comprehensive plan cannot be considered by the Board if brought under RCW 36.70A.040, rather than RCW 36.70A.130.

The Board finds the City's assertion that Legal Issue 3 must be dismissed because its allegation of inconsistency is based on RCW 36.70A.040 rather than 36.70A.130 is unpersuasive.[15] The motion to dismiss Legal Issue 3 is **denied**.

Legal Issue 4 – SEPA Violation[16]

The City acknowledges it did not conduct a SEPA threshold determination in connection with adoption of the Ordinance.[17] However, the City contends Koontz lacks standing to challenge non-compliance with SEPA because Koontz's interests are not within the zone of interests protected by SEPA but are primarily economic.[18] Further, any injury to the Koontz Coalition members is conjectural, according to the City. *Id.*

Koontz responds that a jurisdiction's action may be challenged for failure to perform the threshold SEPA review without any special showing of a petitioner's standing. Koontz cites *Morris v. City of Lake Forest Park*, CPSGMHB Case No. 97-3-0029c, Order Denying

[15] Board member William Roehl dissents on this point.
[16] The Prehearing Order sets forth Legal Issue 4: Does the Ordinance violate SEPA (RCW 43.21C) because, on information and belief, it was adopted without first complying with the requirements of SEPA?
[17] City Motion, p. 4; Prehearing Order, p. 2.
[18] City Motion, p. 12-13, citing *Davidson Serles v. City of Kirkland*, CPSGMHB Case No. 09-3-0007c, Order on Motions, pp. 16-17.

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Dispositive Motions (Jan. 9, 1998), p. 2, and *Kitsap Citizens for Rural Preservation v. Kitsap County*, CPSGMHB Case No. 05-3-0039, Order on Motions (Oct. 20, 2005), p. 10.

The City in reply cites *Hood Canal Environmental Council v. Kitsap County*, CPSGMHB Case No. 06-3-0012c, Order on Motions (May 8, 2006), pp. 6-10, where the Board denied SEPA standing to petitioners who challenged the county's failure to issue a new threshold determination after substantial revisions to a draft critical areas ordinance.

The Board notes SEPA requires a SEPA petitioner to have first exhausted administrative remedies. Typically, that requires commenting on SEPA documents during a required SEPA comment period. WAC 197-11-454(2).[19] However, when an agency fails to conduct even a threshold SEPA determination, the Board has recognized that the SEPA comment requirement is inapplicable. Similarly, when no SEPA threshold determination has been made, an aggrieved party has no further administrative remedies and may bring a failure-to-act challenge to the Board. The Board finds Koontz has exhausted its administrative remedies and is not barred from bringing its SEPA challenge by the requirement to comment.

Citing *Morris,* Koontz further argues the interest/injury requirement for APA/SEPA standing must also be disregarded. No other authorities have been cited for disregard of the interest/injury analysis, and the cases cited in the briefs are not on point. In *KCRP v. Kitsap County*, the Board deferred review of the petitioners' SEPA standing to briefing and argument, as there was a question whether an exemption to SEPA review was applicable.[20] In the *Hood Canal* case, the Board addressed the question of SEPA standing but ultimately determined there was no basis for requiring a new SEPA review, relying on WAC 197-11-600(3)(b)(1) and *Save a Neighborhood Environment v. City of Seattle,* 101 Wn. 2d 280, 676 P.2d 1006 (1984).[21]

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[19] "(2) Other agencies and the public. Lack of comment by . . . members of the public on environmental documents, within the time periods specified by these rules, *shall be construed as lack of objection* to the environmental analysis. . . ." (emphasis added)

[20] *KCRP v. Kitsap County*, at 5-10, determining the SEPA challenge was not barred by the exhaustion requirement, but otherwise deferring ruling on SEPA standing.

[21] *Hood Canal*, at 11.

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Under the circumstances of the present case, the Board sees no reason to defer the interest/injury analysis to determine SEPA standing.

In *Lowen Family Limited Partnership v. City of Seattle*, Case No. 13-3-0007, Order on Motions (Sep. 30, 2013), a property owner whose redevelopment capacity was restricted by a required setback claimed SEPA standing based on (1) an interest within the zone of interests protected by SEPA, and (2) injury in fact. The Board stated:

> Economic interests are not within the zone of interests protected by SEPA. Instead, Petitioner alleges that the height restrictions in the Ordinance will result in less opportunity to provide public amenities such as affordable housing, transportation, and "other elements of the environment that should have been addressed in the FEIS." Arguably, these interests are within the zone of interests protected by SEPA.[22]

Koontz similarly claims interest in provision of affordable housing, which is arguably within the SEPA zone of interests.[23] Koontz further asserts actual injury because present and future development projects may be subject to higher fees under the Ordinance as a condition of bonus height or density.

The Board notes the legislative provisions for affordable housing incentive programs provide three alternatives by which developers may quality for additional height and density: development of low income housing on site, development of units "in the general area," and payment in lieu of low-income unit development. RCW 36.70A.540(2)(g) and (h). Given the options for provision of housing on site or in the vicinity, the Board finds Koontz has not demonstrated the City's adoption of an Ordinance raising the in-lieu fee creates any injury-in-fact. Koontz Coalition members may achieve any available density and height bonuses through actual development of low-income housing, regardless of the in-lieu fee structure. For purposes of a determination of SEPA standing, Koontz's statement of alleged injury is insufficient.

The Board finds and concludes the Koontz Coalition has failed to demonstrate standing to bring a challenge under SEPA. Legal Issue 4 is **dismissed.**

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[22] *Lowen Family*, Order on Motions (Sep. 30, 2013), p. 8.

[23] Like the Lowen Family's claimed interests, the Koontz assertion on this point is tenuous at best.

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ORDER

The Board ORDERS:

- Legal Issue 2 is withdrawn and **dismissed**.
- Legal Issue 4 is **dismissed** as Petitioner has failed to demonstrate standing to pursue claims under SEPA.
- The City's motion to dismiss Legal Issues 1 and 3 is **denied**.

DATED this 16th day of May, 2014.

Margaret A. Pageler, Board Member

William Roehl, Board Member
(Dissenting as to Legal Issue 3)

Cheryl Pflug, Board Member

Partial Dissent of Board Member William Roehl

I concur with the Board's decisions as to Issues 1, 2 and 4 but respectfully disagree in regards to Issue 3. As the City contends, RCW 36.70A.040 applies to the initial adoption of GMA plans and development regulations. RCW 36.70A.130 addresses the requirement to regularly update those plans and regulations. It includes the mandate to insure comprehensive plan amendments conform to chapter 36.70A RCW and that development regulations are consistent with and implement comprehensive plan provisions.

Legal Issue 3 is worded as follows:

> Does the Ordinance violate RCW 36.70A.040 because it is inconsistent with the Comprehensive Plan, including policies UVG-4, UVG-7, UVG-20, UVG-29, UVG-30, UVG-31, UVG-32, UV-34, H8, DT-G2, and DT-HP3?

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This issue alleges an inconsistency between specific Seattle Comprehensive Plan policies and the development regulations amended by and included in challenged Ordinance 124388. That challenge would properly be brought under RCW 36.70A.130 which includes, in part, the requirement to insure development regulation amendments are consistent with the comprehensive plan. I would dismiss the Petitioner's Issue 3.

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